

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

227160

**CARGILL, INCORPORATED**

**Complainant,**

**v.**

**BNSF RAILWAY COMPANY**

**Defendant.**

**Docket No. 42120**

ENTERED  
Office of Proceedings  
MAY 26 2010  
Part of  
Public Record

**BNSF RAILWAY COMPANY'S REPORT ON THE PARTIES' CONFERENCE  
AND COMMENTS ON PROPOSED PROCEDURAL SCHEDULE**

Pursuant to 49 C.F.R. § 1111.10(a), counsel for Defendant, BNSF Railway Company ("BNSF"), and Complainant, Cargill Incorporated ("Cargill"), have conducted a conference to discuss procedural and discovery matters in this case. Because the parties could not agree on a proposed procedural schedule to govern future activities and deadlines in the case, each party is filing a separate report regarding the results of this conference and proposals with respect to the procedural schedule. Cargill filed its report on May 24, 2010. BNSF's report is set forth below:

1. BNSF advised Cargill in the procedural discussions that BNSF intends to file a motion to dismiss some of the claims raised by Cargill and that BNSF intends to file the motion for partial dismissal on or before May 28, 2010. BNSF proposed that the establishment of a procedural schedule be put off until the Board rules on BNSF's motion for partial dismissal. BNSF noted that such an approach would be consistent with the approach followed by the Board in *Dairyland Power Cooperative v. Union Pacific Railroad Company*, STB Docket No. 42105 (served April 29, 2008) (holding procedural schedule in abeyance pending ruling on motion to

dismiss). Cargill rejected BNSF's proposal and included a proposed schedule in its May 24, 2010 filing.

2. BNSF believes that the most efficient and cost-effective approach to a procedural schedule in this case would be to wait until the Board addresses the issues raised in BNSF's motion for partial dismissal before setting a procedural schedule. If the Board grants BNSF's motion for partial dismissal, the range of issues to be addressed in the case and the scope of permissible discovery will be significantly narrowed. By waiting to establish a procedural schedule, the parties can avoid engaging in expensive and time-consuming discovery and fact development that might ultimately prove unnecessary. Furthermore, an appropriate procedural schedule should be tied to the scope and complexity of the issues to be addressed which cannot be determined until the Board has ruled on BNSF's motion for partial dismissal. Therefore, the most practical approach is for the Board to stay the establishment of a procedural schedule until it decides BNSF's motion.

3. Cargill maintains in its May 24, 2010 filing that the actions of the Board in the *Dairyland* case support the establishment of a procedural schedule at this time. However, as noted above, in *Dairyland* the Board held the procedural schedule in abeyance pending its decision on the defendant's motion to dismiss in that case. Cargill acknowledges that the Board originally stayed the procedural schedule in that case but maintains that the guidance provided by the Board when the Board ruled on the defendant's motion to dismiss makes a similar stay of the schedule unnecessary here. Cargill is incorrect for two reasons.

4. First, as BNSF will explain in its motion for partial dismissal, the Board did provide guidance in *Dairyland* as to the proper scope of a challenge to a railroad's fuel surcharge program, but Cargill disregarded that guidance in framing its challenge to BNSF's fuel surcharge

program in this case. The Board made it clear in *Dairyland* that there were limits on challenges to fuel surcharges that could be pursued through unreasonable practice claims, but Cargill has not respected those limits.

5. Second, the public record from the *Dairyland* proceeding makes clear that, even after the Board provided guidance on the permissible scope of challenges to fuel surcharges under the Board's unreasonable practice jurisdiction, the parties in the *Dairyland* case continued to have disputes concerning the appropriate scope of discovery. As a result of those disputes, the Board found it necessary to suspend the procedural schedule a second time despite the guidance that had previously been provided. *Dairyland Power Cooperative v. Union Pacific Railroad Company*, STB Docket No. 42105 (served Sept. 15, 2008).

6. If a procedural schedule is established at this time, there will very likely be disputes over the proper scope of discovery, as there were in *Dairyland*, that may not arise after the Board addresses BNSF's motion for partial dismissal. The most appropriate and efficient approach in this case is to avoid unnecessary litigation over discovery issues and to establish a procedural schedule after BNSF's motion for partial dismissal has been decided and after the proper scope of this case has been defined. That was the approach taken in *Dairyland* and there is no reason to depart from it here.

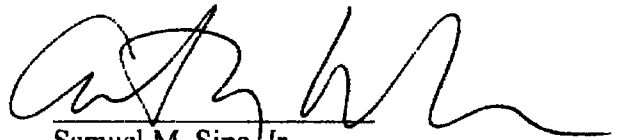
7. BNSF therefore believes that it would be premature to establish a procedural schedule at this time. However, if the Board were to establish a procedural schedule, the schedule proposed by Cargill is not appropriate. Cargill has provided itself with 210 days, including 90 days following the close of discovery, to prepare its Opening Statement while providing only 60 days for BNSF to prepare its Reply Statement. If Cargill anticipates that this case will present issues of such complexity that it requires 90 days following the close of a 120

day discovery period to prepare its evidence, BNSF should be provided at least 90 days as well to prepare its Reply Statement.

8. BNFS acknowledges that the parties have agreed on the terms of a proposed protective order and does not oppose Cargill's separate motion asking the Board to adopt the protective order.

WHEREFORE, BNSF requests that the Board wait to establish a procedural schedule until it has addressed BNSF's motion for partial dismissal, which BNSF expects to file on or before May 28, 2010.

Respectfully submitted,



Samuel M. Sipe, Jr.  
Anthony J. LaRocca  
STEPHENS & JOHNSON  
1330 Connecticut Avenue N.W.  
Washington, D.C. 20036

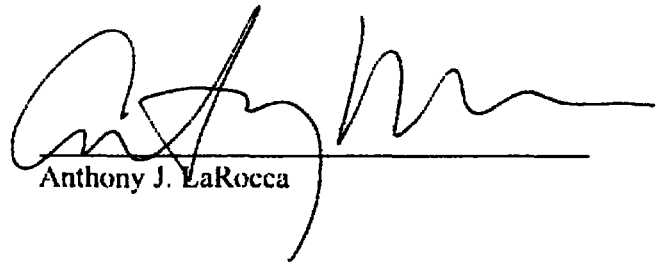
ATTORNEYS FOR  
BNSF RAILWAY COMPANY

Dated: May 26, 2010

**Certificate of Service**

I hereby certify that on this 26th day of May, 2010, I have served a copy of the foregoing  
Report on the following by hand delivery:

John H. LeSeur  
Peter A. Pfohl  
Daniel M. Jaffe  
Stephanie M. Adams  
Slover & Loftus LLP  
1224 Seventeenth Street, N.W.  
Washington, DC 20036



Anthony J. LaRocca